UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

MARIO MARTINEZ, JR., PAULA MERCADO, MARTIN MERCADO JANE DOE, MARIA ROE, STEVEN DAHL, ACLU NEBRASKA FOUNDATION, AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 22	)	**Case Nos. 4:10-cv-3140 and 8:10-cv-00270**
Plaintiffs,	)	
v.	)	
CITY OF FREMONT; DEAN F. SKOKAN, JR. IN HIS OFFICIAL AS FREMONT CITY ATTORNEY; AND TIMOTHY MULLEN, IN HIS OFFICIAL CAPACITY AS FREMONT CHIEF OF POLICE,	)	**DEFENDANTS' BRIEF RESPONDING TO COURT'S ORDER TO FILE BRIEFS ON ISSUE OF FEDERAL COURT JURISDICTION**
Defendants,	)	
AND	)	
FRED H. KELLER, JR., JUAN ARMENTA, JUAN DOE, JUANA DOE and JUANA DOE # 2,	)	
Plaintiffs,	)	
v.	)	
CITY OF FREMONT,	)	
Defendant.	)	

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INTRODUCTION

This Court has asked the parties to brief whether the Court has jurisdiction to adjudicate the pending actions brought against the City of Fremont regarding Ordinance 5165, concerning the employment of unauthorized aliens and the harboring of illegal aliens. Specifically, this Court has questioned whether or not it possesses subject matter jurisdiction to decide the case because both Plaintiff groups have alleged, in addition to their claims arising under federal law, that the enactment of Ordinance 5165 exceeds the municipal powers that Fremont possesses under Nebraska state law. Parties were instructed to review the decision by Judge Webber in *Reynolds v. City of Valley Park*, 2006 U.S. Dist. LEXIS 83210 (E.D. Mo. 2006), to determine whether jurisdiction was lacking in this case for the same reasons expressed by Judge Webber.

Defendants maintain that the Court does possess federal question jurisdiction over the federal questions that dominate Plaintiffs' Complaints, and the Court has supplemental jurisdiction over Plaintiffs' additional state law claim. Defendants will first lay out the relevant law on federal question jurisdiction, and then explain why this Court is not divested of that jurisdiction due to the inclusion of Plaintiffs' state law claim. Defendants also note that if this Court nevertheless concludes that it lacks jurisdiction to hear the case because of Plaintiffs' inclusion of a state law claim in addition to their federal law claims, Defendants will not object to Plaintiffs amending their Complaints so as to dismiss their state law claim.

I. FEDERAL QUESTION JURISDICTION AND SUPPLEMENTAL JURISDICTION EXIST

"The [federal] district courts have original jurisdiction under the federal question statute over cases "'arising under the Constitution, laws or treaties of the United States.'" *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 163 (2002) (*citing Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 8 (1983)). "[A] cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *City of Chicago*, 522 U.S. at 163 (*citing Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)).

Plaintiffs clearly have numerous claims that are federal question claims, granting this court subject matter jurisdiction. The Keller plaintiffs claim that Ordinance 5165 is (1) preempted under the United States Constitution; (2) violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (3) violates the Federal Fair Housing Act; (4) violates 42 U.S.C. § 1981; (5) violates the Commerce Clause of the United States Constitution; and (6) is preempted by the federal Fair Housing Act. Keller Cmpl. at ¶¶ 103-121. The Martinez Plaintiffs allege that the Fremont Ordinance (1) violates the Supremacy Clause of the United States Constitution; (2) violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; (3) violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution; and (4) violates the Federal Fair Housing Act. Martinez Am. Cmpl. at ¶¶ 93-108. "When a federal question is present on the face of the complaint, the district court has original jurisdiction . . ." *Williams v. Ragnone*, 147 F.3d 700, 702 (8th Cir. 1998) (*citing Caterpillar*, 482 U.S. at 392-93). As such, this Court has federal question jurisdiction.

An Article III court can possess original jurisdiction over a state law claim "through the use of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a), provided that another claim in

the complaint is removable." *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2002).[1] A case is only removable if the Court has original jurisdiction over that claim. *City of Chicago*, 522 U.S. at 165 ("[A] removed case is necessarily one 'of which the district courts have original jurisdiction.'") (*citing* 28 U.S.C. § 1441(a); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351 (1988)). That is precisely the case here—the Court has original jurisdiction over the federal court claims asserted by Plaintiffs, and supplemental jurisdiction over the state law claim.

"As for [the plaintiff's] accompanying state law claims, the [Supreme] Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact,' such that 'the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" *City of Chicago*, 522 U.S. at 164-165 (*citing Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Hurn v. Oursler*, 289 U.S. 238 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175 (1909)). Congress codified those principles at 28 U.S.C. § 1367: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *City of Chicago*, 522 U.S. at 165. The supplemental jurisdiction statute "applies with equal force" to both removed cases and cases, like this one, that are "initially filed there." *Id.* (*citing* 28 U.S.C. § 1441(a); *Carnegie-Mellon Univ.*, 484 U.S. at 350-351).

[1] The *Reynolds* court did not consider supplemental jurisdiction, but did state that it was not inapplicable to the case. *Reynolds*, 2006 U.S. Dist. LEXIS 83210, at 17 n.5.

Therefore, the jurisdictional question for the Court is whether the state law claims "constitute 'other claims that . . . form part of the same case or controversy.'" *City of Chicago*, 522 U.S. at 165 (*citing* 28 U.S.C. § 1367). In *City of Chicago*, the Court retained jurisdiction over the state law claims and explained that the state law claims did "derive from a common nucleus of operative fact," which was that the challenge involved efforts to obtain demolition permits. *Id.* at 165. Similarly, the claims in this case are also derived from the same nucleus of operative fact—namely, the enactment of Ordinance 5165.

II. THE *REYNOLDS* CASE IS DISTINGUISHABLE

At the hearing on July 28, 2010, this Court expressed concern over whether or not it possesses jurisdiction; suggesting that if Plaintiffs were successful on their single state law claim—namely that the City of Fremont has exceeded its authority under Nebraska state law in enacting the statute—the Court would not need to address any of Plaintiffs' federal law claims. Therefore, the Court posited, it might be said that the case necessarily depends upon the resolution of a state law claim. The Court specifically referred to *Reynolds* on this point.

While *Reynolds* appears to support that conclusion, *see* 2006 U.S. Dist. LEXIS 83210, at 29-30, there is a crucial distinction between this case and the *Reynolds* case that must be recognized. In the *Reynolds* case, a state declaratory judgment act was used as the conduit through which *all* federal and state claims in the case were brought. *Id*. at 2. Therefore, in *Reynolds*, "Plaintiffs argue[d] that [the] case arises *solely* under state law." *Id*. at 11 (emphasis added). As the *Reynolds* Court explained, the Missouri Declaratory Judgment Act decisively changed the procedural posture of the case. The plaintiffs in *Reynolds* brought their case in Missouri state court, using the Missouri Declaratory Judgment Act to overcome any potential

ripeness problems. The defendants in *Reynolds* then removed the case to federal court, at which point plaintiffs sought to remand the case back to state court. The *Reynolds* court determined that, because the federal claims were brought under the Missouri Declaratory Judgment Act, then all claims in the case were dependent upon that state law in order for a cause of action to exist. *See id.*at 16 ("[E]ven assuming that Plaintiffs could have raised the preemption 'claims' in federal court, it is not clear that they could have done so at the present time, and in the present procedural posture."), 17-19. For that reason, the *Reynolds* Court concluded that the entire case was dependent upon the operation of the Missouri Declaratory Judgment Act; and therefore the federal district court lacked jurisdiction.[2] As the *Reynolds* Court concluded, "This Court finds that each of the federal questions that are presented by the Plaintiffs' state court complaint are theories under a single state claim, and therefore do not provide the basis for federal question jurisdiction." *Id*. at 14. That is fundamentally different from the structure of the case at bar. Plaintiffs in the case at bar do not rely upon a state declaratory judgment act to create a conduit through which all claims flow.

III. THE "DEPENDS NECESSARILY ON A SUBSTANTIAL QUESTION OF FEDERAL LAW" DOCTRINE DOES NOT DIVEST THIS COURT OF JURISDICTION

This Court expressed concern that the phrase "depends necessarily on a substantial question of federal law," *Merrell Dow Pharmaceutical Inc. v. Thompson*, 478 U.S. 804, 807

[2] The *Reynolds* Court's decision in this regard may have been inconsistent with *City of Chicago*. "[E]ven though state law creates [a party's] causes of action, its case might still 'arise under the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *City of Chicago.*, 522 U.S. a 164. In *City of Chicago*, the plaintiff raised its federal constitutional claims "by way of a cause of action created by state law," yet the Court nevertheless found that the Plaintiffs possessed standing. *Id.* at 164.

(1986) (*quoted by Reynolds*, 2006 U.S. Dist. LEXIS at 27), might operate to divest this court of jurisdiction because Plaintiffs' solitary state law claim, if successful, could render Plaintiffs' federal law claims unnecessary. The "necessarily depends" phrase has been used by the Supreme Court in numerous cases and is taken from a larger explanation of when federal question jurisdiction is appropriate: "[A] well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance, Inc v. McVeigh*, 126 S.Ct. 2121, 2131 (2006) (*cited by Reynolds*, 2006 U.S. Dist. LEXIS at 29). The *Reynolds* Court interpreted this phrase to mean that an Article III court must ask whether "federal law is an essential element" in order for Plaintiffs to prevail in their case. *Reynolds*, 2006 U.S. Dist. LEXIS 83210 at 30. Defendants respectfully suggest that the *Reynolds* Court applied the "necessarily depends" language too broadly. There are three reasons why this is the case.

First, the necessarily depends language is part of a test presenting two alternative ways of assessing whether federal question jurisdiction exists. Federal jurisdiction exists if *either* federal law creates a cause of action *or* the plaintiff's remedy necessarily depends on the resolution of a question of federal law. *Empire Healthchoice Assurance*, 126 S.Ct. at 2131. If federal law forms the basis for a cause of action, as in this case, then that is enough to create federal jurisdiction. The "necessarily depends" language is an *alternate* basis for federal jurisdiction, not an additional requirement. In the words of the Supreme Court, it was evaluating "the argument that Empire's reimbursement claim, even if it does not qualify as a 'cause of action created by federal law,' nevertheless arises under federal law for § 1331 purposes, because federal law is 'a necessary element of the [carrier's] claim for relief.'" *Empire Healthchoice*

Assurance, 126 S. Ct. at 2136 (citations omitted). Note that the two categories are phrased in the alternative.

It should also be noted that the *Reynolds* court held that federal court jurisdiction was lacking because the plaintiffs' federal challenges in their complaint were actually defenses to a future enforcement action, not "claims." 2006 U.S. Dist. LEXIS at 23-24. In the cases at bar, Plaintiffs' claims include violations of the Supremacy Clause, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as other federal claims. Keller Compl. ¶¶ 103-12; Martinez Compl. ¶¶ 85-97. These are claims arising under federal law directly, not state law claims that depend upon the resolution of a question of federal law.

Second, the "necessarily depends" language does not refer to a plaintiff's entire complaint. Rather, it refers to each individual claim in a complaint. That is, an individual claim will be deemed to present a federal question if that particular claim "necessarily depends on resolution of a substantial question of federal law." For example, in *Christianson v. Colt Industries*, 486 U.S. 800 (1988), the plaintiffs brought an antitrust action which included several claims that potentially turned on federal questions. Rather than reviewing the entire case to see if plaintiffs presented a state law claim that was sufficient to sustain to allow them to prevail, independent of any federal claims, the Court reviewed each claim to determine whether the particular claim presented a federal question: "[T]he dispute centers around whether patent law 'is a necessary element *of one of the* well-pleaded [antitrust] *claims*.'" *Christianson*, 486 U.S. at 809 (emphasis added). At no point did the Court ask whether the Plaintiffs' entire case could rest (and prevail) on a state law claim alone. *See id.* at 809-813. The question is not whether the plaintiffs could prevail on any state law claim, thereby making adjudication of any federal questions unnecessary. Rather, the question was whether *any of the individual claims* could be

described as a claim that necessarily depended on the resolution of a federal question. If so, federal question jurisdiction exists.

Third, as the Supreme Court made clear in *Empire Healthchoice Assurance*, the "necessarily depends" inquiry is not decisive in many cases. It is only operative when none of the causes of action arises under federal law, and it can be argued that federal law is a "necessary element" of a cause of action that otherwise appears to rest on state law. This, the Court said, occurs in only a "special and small category" of cases. *Empire Healthchoice Assurance*, 126 S. Ct. at 2136. If the opposite were true, and the existence of a single state law claim could eliminate federal jurisdiction, then that category of cases would turn from a "special and small category" into a huge category of cases, denying federal courts lack jurisdiction to hear any case that contains an independent and sufficient state law claim.

IV. PLAINTIFFS CAN VOLUNTARILY DISMISS THEIR STATE LAW CLAIM

For the reasons explained above, Defendants maintain that this Court possesses jurisdiction in this matter. However, Defendants acknowledge that some of the reasoning in *Reynolds* suggests otherwise. *Reynolds*, 2006 U.S. Dist. LEXIS 8320, at 27-30. If this Court concludes that it lacks federal question jurisdiction over the cases as they are currently structured, Plaintiffs can voluntarily dismiss their state law cause of action, which would appear to remove any question as to their ability to proceed in federal court. Defendants would not object to Plaintiffs amending their Complaints accordingly.

Dated this 16th day of August, 2010.

CITY OF FREMONT, *et al.*,
Defendants.

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